

Hon. James L. Robart

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

AUBRY MCMAHON,

Plaintiff,

v.

WORLD VISION, INC.,

Defendant.

Case No.: 2:21-cv-00920-JLR

PLAINTIFF'S MOTIONS *IN LIMINE*

NOTE ON MOTION CALENDAR:
JUNE 16, 2023

INTRODUCTION

Plaintiff Aubry McMahon ("Plaintiff") requests four pre-trial evidentiary rulings by the Court, which are precluding the introduction of any evidence by Defendant related to: (1) Plaintiff engaging in sexual conduct with anyone; (2) Plaintiff's history of her sexual identity and the disclosures made to her family as to her sexual orientation; (3) Plaintiff having previously suffered from an eating disorder; and (4) Plaintiff's activism for LGBTQ rights including, inter alia, her involvement with the Charlotte Area Liberal Moms group (abbreviated CALM), Timeout Youth, or selling homemade items online that contain pro-LGBTQ messaging.

STATEMENT OF FACTS

A. Statement of Case.

This case is one involving discrimination on the basis of sex, sexual orientation and marital status brought under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Washington Law Against Discrimination ("WLAD"), Rev. Code Wash. ("RCW") § 49.60.

Plaintiff, who is a gay woman in a same-sex marriage, contends that Defendant World Vision, Inc. (“Defendant” or “World Vision”) rescinded its job offer to her for the position of customer service representative because it learned she was in a same-sex marriage. Defendant took this action in furtherance of a hiring policy that facially discriminates against individuals with respect to sex, sexual orientation, and marital status as the policy effectively prohibits the employment of any individual who is in a same-sex marriage.

Certification.

The parties conferred through counsel on May 18, 22, 24, and 25, 2023, in an effort to resolve the matters in dispute. Issues upon which no agreement could be reached are addressed below, as are the facts pertinent to each issue.

LEGAL ARGUMENT

Motions *in limine* arise from “the court’s inherent power to manage the course of trials” and “exclude anticipated prejudicial or irrelevant evidence before it is actually offered at trial.” *Luce v. United States*, 469 U.S. 38, 40 n.2, 41 n.4 (1984). Motions *in limine* also promote “judicial economy” and “save jury time.” See *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979), *overruled on other grounds by Luce*, 469 U.S. at 40, n.3. “A party may bring a motion *in limine* to obtain a ruling on the admissibility of specific evidence to be *introduced at trial*.” *Nelson v. Paulson*, C08-1034-JCC, 2008 U.S. Dist. LEXIS 128803, at *1 (W.D. Wash. Dec. 15, 2008) (emphasis in original). The trial court has discretion to admit or deny a motion *in limine*. See *U.S. Fid. & Guar. Co. v. Lee Inv. LLC*, 641 F.3d 1126, 1137 (9th Cir. 2011) (reviewing district court’s order on motions *in limine* for abuse of discretion).

MOTION IN LIMINE 1: Precluding any Evidence Relating to Plaintiff Engaging in Sexual Conduct Outside Heterosexual Marriage

As touched upon in Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, Defendant sought to reframe its decision to revoke Plaintiff’s job offer as being based on her purported sexual conduct as opposed to her protected traits of sex (female), sexual orientation (gay), and marital status (being in a same-sex marriage). Dkt. No. 30. Defendant

1 alleged in its moving papers that “[n]either sexual conduct outside of biblical marriage, nor the
 2 class of those who promote it, is protected by Title VII,” Dkt. No. 26 at p. 13 (quotation and
 3 citation omitted), and further, “[World Vision] rescinded her offer because of her *sexual*
 4 *conduct outside biblical marriage* and such conduct (or its open promotion) required the same
 5 result regardless of gender (or [sexual] orientation).” Dkt. No. 26 at pp. 13-14 (citation
 6 omitted).

7 Relevance is the threshold evidentiary hurdle all admissible evidence must meet. *See*,
 8 *e.g.*, *Bultena v. Wash. State Dep’t of Agric.*, 319 F. Supp. 3d 1215, 1220 (E.D. Wash. 2018).
 9 Rule 401 of the Federal Rules of Evidence states that relevant evidence is evidence “having any
 10 tendency to make the existence of any fact that is of consequence to the determination of the
 11 action more probable or less probable than it would be without the evidence.” Fed. R. Evid.
 12 401; *Garcia v. Praxair, Inc.*, Case No. 1:18-cv-01493-SAB, 2021 U.S. Dist. LEXIS 1329, at
 13 *19 (E.D. Cal. Jan. 5, 2021) (facts learned after deciding to take adverse employment action is
 14 not probative of whether the decision maker was aware of these facts when he or she made the
 15 decision). Here, nowhere in the record is there any evidence that Defendant asked Plaintiff,
 16 prior to rescinding its job offer to her, whether she was engaging in sexual conduct with her
 17 wife. All Defendant knew was that Plaintiff was in a same-sex marriage and she was having a
 18 baby. For all Defendant knew, Plaintiff and her wife were in a celibate, platonic marriage.
 19 Accordingly, Defendant should not be permitted to introduce any evidence at trial that Plaintiff
 20 was (or is) engaged in sexual conduct with her wife or any other person outside a heterosexual
 21 marriage.

22
 23 **MOTION IN LIMINE 2: Precluding any Evidence Relating to the History of Plaintiff’s**
 24 **Sexual Identity and the Disclosures Made to Her Family as to**
 25 **Her Sexual Orientation**

26 During Plaintiff’s deposition, certain testimony was elicited as to Plaintiff’s personal
 27 journey regarding her sexual identity. These questions included: “I’d like to ask you some
 [questions] about how you came to decide that you are same-sex attracted as it were,” Tr. at

85:21-23, and “Can you take me back to the start of the journey where you came to that recognition [that you were a lesbian]?” Tr. at 86:2-8. There were also questions asked (and responses given) relating to disclosing to her family of her sexual orientation. One such question was: “So it sounds like there was a point where you told people, like your family, [of your sexual orientation] ... is that right?” Tr. at 88:5-10. Further, another line of questioning elicited a response relating to how Plaintiff’s family reacted to the news of Plaintiff “coming out” and the lack of support initially extended by her family to her being gay. Tr. at 92:15-93:10.

Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence.” Fed. R. Evid. 401(a). “The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. However, “[i]rrelevant evidence is not admissible.” Fed. R. Evid. 402. Further, Rule 403 contemplates the preclusion of evidence that “‘appeals to emotion in ways that seem likely to overpower reason’ or evidence likely to be misused for an improper purpose.” *Mendez v. Reinforcing Ironworkers Union Local 416*, 2:09-CV-02332-LRH-NJK, 2013 U.S. Dist. LEXIS 4068, at *6 (D. Nev. Jan. 7, 2013) (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:13 (3d ed. 2012)).

Here, testimony related to Plaintiff’s personal journey in coming to realize that she was gay is wholly irrelevant to any claim or defense in this matter. It is undisputed that at the time Plaintiff applied for the customer service position with World Vision, she identified as a “lesbian” or simply “gay.” Tr. at 91:11-19; 92:1-2. Any evidence as to how she understood her sexual identity or her personal journey to recognizing her sexual orientation (and that she was indeed gay) is irrelevant. Further, none of this information was known by Defendant at any time prior to Plaintiff’s deposition, which took place on February 24, 2023 (more than two years after her job offer had been revoked), and clearly played no role in Defendant’s decision relating to that revocation. This information also runs the risk of appealing to emotion or which

1 could be misused for an improper purpose. Plaintiff fears that information relating to her
 2 journey in understanding her sexual orientation could be weaponized by Defendant to exploit
 3 destructive stereotypes in hopes that it may resonate with jurors' potential biases. This, in and
 4 of itself, also warrants preclusion.

5 With respect to evidence relating to Plaintiff "coming out" to her family and her
 6 family's initial non-acceptance of her sexual orientation, such information is irrelevant in this
 7 matter. Defendant was never aware of this at any point and it played no role in its decision to
 8 rescind her job offer. Also, this subject matter can be very painful for an openly gay person to
 9 revisit, and unless unquestionably relevant (of which here there is no relevance), this further
 10 inures to preclusion.

11
 12 **MOTION IN LIMINE 3: Precluding any Evidence Relating to Plaintiff Having**
 13 **Previously Suffered from an Eating Disorder**

14 At Plaintiff's deposition, she was asked certain questions relating to a book she wrote
 15 called "Still I Rise," the contents of which included her struggles with an eating disorder.
 16 Specifically, Plaintiff testified that she struggled with an eating disorder in high school and
 17 then into college and as to the treatment she received as a result. Tr. at 58-60. Plaintiff also
 18 discussed the impact this had on her family (describing it as a "huge shock" when her family
 19 came to learn about it, Tr. at 61:1-6).

20 Plaintiff submits this information is also irrelevant to any claim or defense in this case
 21 and should be precluded. Further, to the extent that Defendant posits that it should be permitted
 22 to explore this subject matter as it potentially touches upon the causes of any emotional distress
 23 suffered by Plaintiff, such averment should be rejected as wholly speculative and lacking any
 24 evidentiary foundation. Plaintiff was indeed asked about whether and how the rescission of the
 25 job offer impacted her "health and wellbeing," Tr. at 250:19-25, however, Defendant did not
 26 inquire as to whether the emotional distress from which Plaintiff suffered (or from which she
 27 currently suffers) is instead attributable to an eating disorder she experienced in her youth. It's

unknown why Defendant didn't probe this topic. Further, Defendant could have sought Plaintiff to submit to an independent medical examination in order to discern the root(s) of any emotional distress, but instead chose not to. In any event, to suggest Plaintiff's emotional distress damages are the result of her eating disorder lacks any evidentiary foundation and any averment would be purely speculative. Lastly, this topic involves a very personal and sensitive subject matter which could be disallowed to be discussed at trial unless absolutely relevant and necessary, which isn't the circumstance here.

MOTION *IN LIMINE* 4: Precluding any Evidence Relating to Plaintiff's Activism for LGBTQ Rights Including, Inter Alia, Her Involvement with the Charlotte Area Liberal Moms Group (Abbreviated CALM), Timeout Youth, or Selling Homemade Items Online that Contain Pro-LGBTQ Messaging

During Plaintiff's deposition, she was asked various questions regarding the activism by her and her wife in the LGBTQ community. In response, Plaintiff testified that she was involved in an organization in the Charlotte, North Carolina area called "Timeout Youth," which is an organization that hosts kids after school and provides resources if somebody may be transgender or questioning one's sexual identity or sexuality. Plaintiff also explained that her wife volunteers for this organization in the summers. Tr. at 63:2-19. Further, Plaintiff stated that she and her wife stay active in the LGBTQ community including "attending the Charlotte Pride," Tr. at 63:17-19 (which is a festival celebrating LGBTQ rights) and being active in a group called Charlotte Area Liberal Moms (abbreviated CALM), which Plaintiff explained was an organization of "moms helping moms, but also supporting businesses that are LGBTQ friendly and inclusive." Tr. at 63:20-24.

Defendant also inquired as to Plaintiff selling homemade items online which contained pro-LGBTQ messaging. (Anecdotally, Plaintiff was also asked about selling homemade items containing positive messaging relating to overcoming eating disorders. Tr. at 70:11-17.) Insofar as is relevant, Plaintiff stated that she creates certain items including t-shirts and

1 magnets containing, inter alia, the CALM insignia as well as a rainbow, which is the color
 2 scheme associated with the LGBTQ community. Tr. at 73-77. Plaintiff notably also created a t-
 3 shirt that has a quote on it that reads “Love is a terrible thing to hate” which includes a rainbow
 4 on it. Tr. at 77:17-24.

5 This involvement by Plaintiff and her wife in the LGBTQ community is wholly
 6 unrelated the adverse employment action taken by Defendant and is irrelevant to any claim or
 7 defense in this action. There is absolutely no evidence that their involvement, either
 8 individually or together, played any role in Defendant’s decision to rescind its job offer.
 9 Furthermore, there is no evidence that World Vision was so much as even aware of Plaintiff’s
 10 activism efforts or that she sold merchandise online with pro-LGBTQ messaging. In fact, this
 11 only became known to Defendant at Plaintiff’s deposition. Rather, it is undisputed that
 12 Plaintiff’s job offer was rescinded upon World Vision becoming aware that Plaintiff was in a
 13 same-sex marriage. Further, allowing Defendant to delve into this subject matter runs the risk
 14 of appealing to the emotions of jurors as to their feelings (and potential disagreement) on
 15 LGBTQ rights issues and could be misused for the improper purpose of playing towards
 16 destructive stereotypes. *See Mendez*, 2013 U.S. Dist. LEXIS 4068, at *6. As such, preclusion is
 17 warranted.

18 CONCLUSION

19 For the foregoing reasons, Plaintiff requests that the Court order that Defendant be
 20 precluded from introducing any evidence related to: (1) Plaintiff engaging in sexual conduct
 21 with anyone; (2) Plaintiff’s history of her sexual identity and the disclosures made to her
 22 family as to her sexual orientation; (3) Plaintiff having previously suffered from an eating
 23 disorder; and (4) Plaintiff’s activism for LGBTQ rights including, inter alia, her involvement
 24 with the Charlotte Area Liberal Moms group (abbreviated CALM), Timeout Youth, or selling
 25 homemade items online that contain pro-LGBTQ messaging.

26 RESPECTFULLY SUBMITTED this 30th day of May 2023.

27 **NISAR LAW GROUP, P.C.**

1 By: /s/ Casimir Wolnowski
2 Casimir Wolnowski
3 One Grand Central Place
4 60 East 42nd Street, Suite 4600
5 New York, New York 10165
6 Phone: (646) 889-1007
7 Fax: (516) 604-0157
8 Email : cwolnowski@nisarlaw.com
9 Admitted *Pro Hac Vice*

10 **FRANK FREED SUBIT & THOMAS LLP**

11 By: /s/ Michael C. Subit
12 Michael C. Subit, WSBA No. 29189
13 705 Second Avenue, Suite 1200
14 Seattle, Washington 98104
15 Phone: (206) 682-6711
16 Fax: (206) 682-0401
17 Email: msubit@frankfreed.com

18 *Attorneys for Plaintiff*